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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No.

CITADEL CORP., PETITIONER

v.

PUERTO RICO HIGHWAY AUTHORITY
AND PUERTO RICO LAND AUTHORITY

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIRST CIRCUIT

Robert H. Rout
Attorney for Petitioner
Lakeville, CT 06039
203-435-9897

QUESTION PRESENTED

Whether petitioner's damage action under the Civil Rights Act of 1871, 42 USC Section 1983, and the Fifth and Fourteenth Amendments against a state-created public corporation for an unconstitutional regulatory "taking" of its land is cognizable in a federal court.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

A writ of certiorari is respectfully sought to review the judgment of the United States Court of Appeals for the First Circuit in this case.

THE OPINION BELOW

The opinion of the court of appeals (App. A, infra, 1a - 13a) is reported at 695 F2d 31.

JURISDICTION

The judgment of the court of appeals (App. A, infra, 1a - 13a) was entered on

December 22, 1982. A petition for rehearing was denied on February 2, 1983 (App. B, infra, 13a). The jurisdiction of this court is invoked under 28 USC 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution of the United States states in relevant part: "No person shall...be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. The Fourteenth Amendment to the Constitution of the United States states in relevant part: "No State shall... deprive any person of life, liberty, or property, without due process of law;"

3. Section 1 of the Civil Rights Act of 1871, 42 USC Section 1983, states the following:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

This is an action brought in the United States District Court for the District of Puerto Rico by petitioner, the owner of 15 acres of unimproved land located in San Juan, Puerto Rico, pursuant to Section 1 of the Civil Rights Act of 1871, 42 USC Section 1983 (herein called the "Act") and the Fifth and Fourteenth Amendments to the Constitution of the United States.

Petitioner claims that defendants under color of state law, custom and usage

kept petitioner's land frozen for 17 years in order to reserve it for acquisition for the construction of a highway interchange in violation of the Act and petitioner's Constitutional rights, thereby entitling petitioner to monetary damages.

The district court granted defendants' motion to dismiss on the grounds of collateral estoppel from which order petitioner appealed to the court of appeals. On December 22, 1982, the court of appeals held that collateral estoppel did not bar petitioner's action in the district court but affirmed the dismissal on the grounds that petitioner's claim for damages stemming from an unconstitutional regulatory "taking" of its land is not cognizable in a federal court and that petitioner's remedy is limited to enjoining defendants' unconstitutional conduct. The court of appeals denied petitioner's petition for rehearing on February 2, 1983.

REASONS FOR GRANTING THE PETITION

A. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEAL AND STATE COURTS OF LAST RESORT AND WHAT APPEARS TO BE THE NOT CLEARLY SETTLED POSITION OF THIS COURT ON THE SAME MATTER.

This case presents the important Constitutional and federal law question of whether a landowner is entitled to damages in a federal court for an unconstitutional regulatory "taking" by a state-created public corporation.

The decision by the court of appeals below erroneously limited the liability of state-created public corporations under the Act and the Fifth and Fourteenth Amendments to enjoining the unconstitutional land use regulation and held that damage actions do not lie in the federal courts for an unconstitutional regulatory "taking." /App. A, infra, 5a - 13a/. If the court of

appeals is correct, petitioner will be deprived of any remedy for the 17 year period during which defendants kept petitioner's property frozen.

The dissenting and concurring opinions of this Court in San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981) (herein called "San Diego Gas"), which appear to reflect the view of the majority of this Court, conflict with the court of appeals below.

The ruling below by the court of appeals is based upon its own decision in Pamel Corp. v. Puerto Rico Highway Authority, 621 F2d 33 (1st Cir. 1980) and, in addition to conflicting with what appears to be the position of this Court in San Diego Gas, as aforesaid, also conflicts with decisions (1) of this Court citing San Diego Gas (Hodel v. Virginia Surface Min. & Recl. Assn., 452 U.S. 264, 305-306 (1981) and Parratt v. Taylor, 451 U.S. 527, 553 n.12);

(2) four other courts of appeals (Barbian v. Panagis, 694 F2d 476, 482 n.5 (7th Cir. 1982), Hernandez v. City of Lafayette, 643 F2d 1188, 1200 (5th Cir. 1981), cert. den. 102 S.Ct. 1251, Shamrock Development Co. v. City of Concord, 656 F2d 1380, 1384 (9th Cir. 1981), Fountain v. Metro Atlanta Rapid Transit Authority, 678 F2d 1038, 1043 (11th Cir. 1982), In Re Air Crash in Bali, Indonesia on April 22, 1974, 684 F2d 1301, 1311 n.7 (9th Cir. 1982), Devines v. Maier, 665 F2d 138, 143 (7th Cir. 1981); and (3) two state courts of last resort (County of Kauai v. Pacific Standard Life Ins., 653 P.2 766, 779 n.20, Hawaii, 1982, and Burrows v. City of Keene, 432 A2d 15, 20, N.H. 1981, all of which appear to support the rule that a damage action by a landowner arising out of an unconstitutional regulatory "taking" of land is a cognizable claim in a federal court under

the Act and the Fifth and Fourteenth Amendments.

The error made by the court of appeals in construing the position of this Court, as aforesaid, is compounded by its express disagreement with this Court on an important legal issue which leads to the precise issue in this case; namely, the unwillingness of the court of appeals to characterize an unconstitutional land use regulation as a "taking" (App. A, infra 9a, note 4) as this Court does in San Diego Gas at 628, note 8; and id. at 651-653 (Brennan, J., dissenting).

Thus, in summary, the conclusion of the court of appeals that a state-created public corporation cannot be sued in a federal court for damages because of an unconstitutional regulatory "taking" is inconsistent with the apparent position of this Court, the federal courts of appeal

for the fifth, seventh, ninth and eleventh circuits, and the courts of last resort of the States of Hawaii and New Hampshire.

B. THE ISSUE PRESENTED IS OF GREAT PUBLIC IMPORTANCE AND SHOULD BE SETTLED BY THIS COURT.

The growing conflict between the rights of private landowners and the control of the environment through land use regulation makes the unsettled issue at bar one of great public importance.

Whether a federal court may provide a monetary remedy to a landowner in the case of an unconstitutional "taking" by regulation or whether it must limit its remedy to injunctive relief has been decided, as aforesaid, by other federal courts of appeal and state courts of last resort in conflict with the court of appeals below, but this important question of constitutional and federal law, although

left "barely open" by this Court (Shamrock Development Co. v. City of Concord, supra page 7, at 1384 and San Diego Gas), has not been but should be settled by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Lakeville, Connecticut, April 29, 1983.

Robert H. Rout
Attorney for Petitioner
Lakeville, CT 06039
203-435-9897

APPENDIX A

THE DECISION BELOW

UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

No. 82-1395

CITADEI CORPORATION,

Plaintiff, Appellant

v.

PUERTO RICO HIGHWAY AUTHORITY, ET AL.,

Defendants, Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

/Hon. Carmen Consuelo Cerezo,
U. S. District Judge/

Before

Coffin, Chief Judge

Timbers, Senior Circuit Judge *

and Bownes, Circuit Judge.

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* Of the Second Circuit, by designation.

Robert H. Rout, for appellant.
Marta Quiñones de Torres, Assistant Solicitor General, with whom Miguel Pagan, Acting Solicitor General, and Americo Serra, Assistant Solicitor General, Department of Justice, were on brief, for appellee.

December 22, 1982

Per Curiam. In a prior action, the District Court for the District of Puerto Rico enjoined various officials of the Commonwealth of Puerto Rico from depriving appellant Citadel Corporation of its property in contravention of the Fifth Amendment (Citadel I). The court in that case, however, denied appellant's claim for damages. In this second action, appellant seeks monetary relief for injuries arising out of the same events, but in this action relief is sought from governmental entities not joined as defendants in the first action. The district court dismissed the instant action on the ground

of collateral estoppel, holding that the issues in Citadel I and Citadel II were identical. [1]

We agree that the instant action should be dismissed, but on the ground of failure to state a claim cognizable in a federal court, rather than on the ground of collateral estoppel.

I.

COLLATERAL ESTOPPEL CLAIM

The district court in the instant case held that Citadel I laid appellant's claims to rest. Appellant had based its first action directly on the Taking Clause of the Fifth Amendment, incorporated in the Fourteenth Amendment, as well as on 42 U.S.C. Section 1983 (1976). That action sought damages and an injunction enjoining the allegedly unconstitutional

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1. Citadel Corp. v. Puerto Rico Highway Authority (Citadel II), No. 79-733 (D.P.R. March 23, 1982).

"freeze" on its property. Governmental agencies had planned to build a highway in the vicinity of appellant's property. In the mid 1960's these agencies proscribed further development on property situated in the path of the proposed highway. Some ten years later, however, plans had not been finalized nor had money been allotted for the construction. The district court in the first action held a full bench trial on appellant's claims. The court decided in favor of appellant on all but the claim for damages. Neither side appealed from the final judgment, although appellant's motion before trial to join additional defendants in the instant action, had been denied on the ground that it was not timely. [2]

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2. The motion to join additional defendants was filed more than two years after plaintiff commenced the action. Citadel Corp. v. Rafael Hernandez Colon (Citadel I) No. 76-1159 (D.P.R. Jan. 8, 1979) (order denying motion to add defendants).

Appellant commenced this second action against the Commonwealth of Puerto Rico, the Puerto Rico Highway Authority, and the Puerto Rico Land Authority while the first action was pending. [3] Appellant makes no claim that it did not receive a fair opportunity to litigate its case fully in Citadel I. The district court held that Citadel I precluded appellant from relitigating the same issue in Citadel II. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331-33 (1979). Although factual issues may have been identical, defendants' different identities in the two actions make reliance on collateral estoppel inappropriate.

While the traditional mutuality re-

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3. Appellant filed the second complaint commencing the instant action on March 19, 1979, apparently not including the individual defendants it had attempted to join in Citadel I.

quirement for issue preclusion has been relaxed, see, e.g., Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 332-37 (1971), affirmative use of collateral estoppel by a nonparty still must be premised on the identity of issues in the two actions. See generally Restatement (Second) of Judgments Section 68 (Tent. Draft No. 4, 1977). Appellees have not demonstrated that the issue of defendants' liability in Citadel II is the same as that in Citadel I. The district court in the first action may have declined to award damages against the defendant public officials for any number of reasons that would not immunize the governmental entities in the second action. The district court's failure in Citadel I to specify its grounds for denying damages makes this likely. The issue of the governmental

entities' liability for alleged unconstitutional action not having been litigated, collateral estoppel does not bar appellant's second action. The critical question therefore is whether appellant has asserted a cognizable theory that would render the governmental entities liable for damages. We turn now to a consideration of this question.

II

ABSENCE OF A CLAIM COGNIZABLE IN A FEDERAL COURT

We held in Pamel Corp. v. Puerto Rico Highway Authority, 621 F.2d 33 (1st Cir. 1980), that damage actions against governmental entities stemming from land use policies were not cognizable in a federal court. Plaintiff in Pamel, like appellant in the instant case, sought damages equivalent to the value of property allegedly "taken" as a result of the restrictive zoning policies of the Puerto Rico Highway Authority. Id. at 34. We characterized

plaintiff's claim in Pamel as an inverse condemnation action, i.e., an action seeking fair compensation for the government's alleged unconstitutional extinguishment of plaintiff's property rights. While recognizing that "[r]egulation of property use may be so oppressive or arbitrary that it crosses the wavering line separating a valid exercise of the police power from an exercise of the eminent domain power," id. at 35, we determined that the proper remedy in such a case was not the awarding of the value of the diminished property right. There are strong policy arguments against any court requiring the state to purchase the property over which it has imposed excessive regulation. See Note, Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance, 26 Stan. L. Rev. 1439, 1452 (1974). Those arguments are even stronger when the court is a federal one. As we

stated in Pamel:

> "[F]ederal enforcement of the inverse condemnation remedy would be a singularly inappropriate intrusion into the states' traditional domains of property law and land use policy. The federal constitutional right can be secured to the individual without forcing the state to purchase his property. Voiding the offending restriction will make the owner whole. Moreover, once the constitutional line has been drawn, the state or local authority administering the complex structure of land use controls should be free to decide whether the expected benefits from the restriction are worth the cost of the required compensation."

621 F.2d at 36 (citations omitted).[4]

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4. Since our decision in Pamel, the Supreme Court has decided San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981). It appears that at least eight of the Justices may disagree with our unwillingness to characterize oppressive regulation as a taking, see 450 U.S. at 628 n.8; id. at 651-53 (Brennan, J., dissenting), but only four would find that such a taking requires compensation, see id. at 653-58 (Brennan, J., dissenting). It may be that Justice Rehnquist's concurrence should be taken as a fifth vote in favor of compensation, see id. at 633-34 (Rehnquist, J., concurring), but deriving enough direction from his

Appellant invites us to limit Pamel to situations in which plaintiffs challenge an invalid zoning restriction. We decline the invitation. Under appellant's theory, Pamel would be inapplicable to the case at hand in which appellant alleges an unconstitutional deprivation due to wrongful conduct by governmental officials. The distinction is not persuasive. Whether the conduct is negli-

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brief comment in support of "much of what is said" by Justice Brennan to abandon our position that the constitution does not require compensation in this case seems to be carrying judicial tea leaf reading to an uncalled-for extreme. In any event, none of the Justices addressed the issue of federal court ordered compensation, since the lower court in San Diego Gas was a state court. Even if the consitution is read to require compensation in an inverse condemnation case, the Eleventh Amendment should prevent a federal court from awarding it. See Quern v. Jordan, 440 U.S. 332 (1979); Edelman v. Jordan, 415 U.S. 651 (1974); Knight v. State of New York, 443 F.2d 415 (2d Cir. 1971); Beck v. State of California, 479 F. Supp 392 (C.D. Cal. 1979); Nasralah v. Barcelo, 465 F. Supp 1273 (D.P.R. 1979).

gent or not, the gravamen of the inverse condemnation claim remains the unconstitutional deprivation of property. Resort can still be made to a tort action in the state courts. The governmental freeze on appellant's property is sufficiently similar to the restrictive zoning in Pamel to bring this case within our holding in Pamel. Both cases involve allegations that state governmental agencies unconstitutionally deprived plaintiffs of property through land use controls. [5] Federal courts may

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5. Arguably, Pamel might be distinguished on the ground that there the cause of action was based on 42 U.S.C. Section 1983, while the instant case also is based directly on a violation of the Fourteenth Amendment. We find such distinction not dispositive. The same concerns which impel the result in the Section 1983 context likewise should govern in a "Bivens" action. Cf. Monell v. New York City Dept. of Social Services, 436 U.S. 658, 712-13 (1978) (Powell, J., concurring) (liability of municipality should be the same whether predicated on Section 1983 claim or implied from the Fourteenth Amendment).

enjoin such unconstitutional conduct on the part of states in an inverse condemnation proceeding, but they may not award damages. The Commonwealth of Puerto Rico's unconstitutional "freeze" on appellant's property therefore does not subject the governmental entities to an action for damages in a federal court.

We affirm the judgment of the district court dismissing the instant action, but we do so on the grounds stated in this opinion.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1395

CITADEL CORPORATION,
Plaintiff, Appellant

v.

PUERTO RICO HIGHWAY AUTHORITY, ET AL.,
Defendants, Appellees

Before

COFFIN, Chief Judge,
TIMBERS, *Senior Circuit Judge,
and BOWNES, Circuit Judge

ORDER OF COURT

Entered: February 2, 1983

It is ordered that the petition for rehearing filed on January 20, 1983 be, and the same hereby is, denied.

By the Court:

/s/ Dana H. Gallup

Clerk.

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* Of the Second Circuit, sitting by designation.

No. 82-1785

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CITADEL CORP.,

Petitioner,

v.

PUERTO RICO HIGHWAY AUTHORITY AND PUERTO RICO LAND AUTHORITY,

Respondents.

On Petition For A Writ Of Certiorari From The United States Court Of Appeals For The First Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

MIGUEL PAGAN
Acting Solicitor General
Of Puerto Rico

GERARDO MARIANI
Assistant Solicitor General
Department of Justice
P.O. Box 192
San Juan, Puerto Rico 00902
(809) 721-2900 ext. 307

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

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On Petition For A Writ Of Certiorari From The United States Court Of Appeals For The First Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE COURT:

Come now Respondents, the Puerto Rico Highway Authority and the Puerto Rico Land Authority, through their undersigned attorneys, and respectfully pray that the Writ of Certiorari requested by Petitioner in this case be denied for the reasons stated and argued in the present brief.

JUDGMENT ORDER BELOW

Review is requested as to the Judgment of December 22, 1982, of the United States Court of Appeals for the First Circuit. (Appendix A to the Petition of Certiorari).

COUNTER STATEMENT OF ISSUES

1) Whether the present action states a claim cognizable in a federal court.

2) Whether the doctrine of Collateral Estoppel barred the action filed in the District Court.

STATEMENT OF THE CASE

Nature Of The Case

The present case is before this Honorable Court on petition for a Writ of Certiorari from the United States Court of Appeals for the First Circuit decision issued on December 22, 1982, affirming a judgment of the United States District Court for the District of Puerto Rico granting defendant's Motion to Dismiss in the case of *Citadel Corporation* v. *Puerto Rico Highway Authority, Puerto Rico Land Authority and the Commonwealth of Puerto Rico.*

The complaint in this case was filed on March 19, 1979, alleging violations of petitioner's constitutional rights under the Fifth and Fourteenth Amendments to the Constitution of the United States in the deprivation of its property without just compensation and without due process of law. Jurisdiction was invoked under 28 U.S.C. Secs. 1331 and 1343, and it was alleged that the cause of action was based on Section 1 of the Civil Rights Act of 1871, 42 U.S.C., Sec. 1983.

Counter-Statement Of Facts

On September 23, 1976, Citadel Corporation filed a complaint in the United States District Court for the District of Puerto Rico under 42 U.S.C. Sec. 1983 against Rafael Hernandez-Colon, individually and as Governor of the Commonwealth of Puerto Rico; Rafael Alonso-Alonso, Francis Conway and Luis Negron Zayas, in-

dividually and as members of the Planning Board of the Common-wealth of Puerto Rico; Rafael Ignacio, individually and as Secretary of the Department of Transportation and Public Works of the Commonwealth of Puerto Rico; Jose G. Jaramillo, individually and as Director of the Office of Land Acquisition of the Department of Transportation and Public Works; and Carlos Rios, individually and as Secretary of Justice of the Commonwealth of Puerto Rico, Civil No. 76-1159, hereinafter called "Citadel I." In said complaint Citadel Corporation alleged that a certain parcel of land owned by it and located in Ward Sabana Llana of Rio Piedras had been partially affected since 1967 and totally affected since 1972, by the planned development for public use and future development of the Department of Transportation and Public Works of the Commonwealth of Puerto Rico of the Route 66 Expressway interchange with the Barbosa Expressway at Sabana Llana South Ward, Rio Piedras. It was further alleged that as a result of the actions of defendants "freezing" the property, its value had been destroyed and plaintiff's sole source of income was threatened, and that said actions constituted a taking of plaintiff's property without just compensation contrary to the Constitution of the United States. Accordingly, plaintiff sought that defendants be ordered to acquire the property and to pay the just value of $50,000 per "cuerda" or the total sum of $728,000; that defendants be ordered to pay jointly to plaintiff the sum of $728,000 as damages; that an injunction be ordered restraining defendants and their agents or employees from enforcing or giving effect to the freeze on plaintiff's property; and that the Court adjudge and declare the acts of defendants to be in violation of the Constitution of the United States.

On January 5, 1979, plaintiff filed a "Motion for Leave to Amend Complaint." on January 8, 1979, plaintiff filed an "Amended Motion for Leave to Amend Complaint and to Add Defendants," alleging that as a result of two depositions taken and from other discovery and investigation, plaintiff had learned of additional facts and the names of additional defendants. The additional defendants that plaintiff sought to add were the Puerto Rico Highway Authority, the Puerto Rico Land Authority, three officers of the Department of Transportation and Public Works and a technician of the Puerto Rico Planning Board.

On January 8, 1979, the District Court entered an Order granting plaintiff's, "Motion for Leave to Amend Complaint," but denying plaintiff's "Amended Motion for Leave to Amend Complaint and to Add Defendants."

On January 24, 1979, defendants filed a Motion to Strike under Rule 12(f) of the Federal Rules of Civil Procedure, and on February 13, 1979, plaintiff filed a motion in opposition to defendants' motion to strike, and a cross motion to join the Puerto Rico Highway Authority, the Puerto Rico Land Authority and the Commonwealth of Puerto Rico as defendants under Rule 20(a) of the Federal Rules of Civil Procedure. On February 28, 1979, the District Court entered a Decision and Order ratifying the denial of plaintiff's motion to add defendants, denied plaintiffs cross Motion to join defendants, and granting defendants' motion to strike. The Court denied plaintiff's requests as illtimed and improper, inasmuch as they were filed more than two years after the original complaint and more than seven months after the establishment of a time table by the Court.

Notwithstanding the Court's Decision and Order of February 28, 1979, plaintiff Citadel Corporation filed a

new complaint on *March 19, 1979*, against the Puerto Rico Highway Authority, the Puerto Rico Land Authority, and the Commonwealth of Puerto Rico, Civil No. 79-733, hereinafter called "*Citadel II*." Said complaint was based on the same facts and legal doctrine as the complaint in *Citadel I*. In this second complaint plaintiff alleged that defendants had kept its property "frozen" and paralyzed since 1964 and had refused to "unfreeze" it or expropriate it, and that the cause of action has arisen from defendant's inexcusable delay in undertaking eminent domain proceedings and from official inaction. Consequently, plaintiff requested judgment against defendants as follows:

> "1. Ordering a preliminary and permanent injunction against defendants restraining and preventing them, their agents, servants and employees and all other persons acting in concert with them, from enforcing, administering or in any manner giving effect to the 'freeze' on plaintiff's Property which has the effect of preventing the sale, lease, use, development or other free use and/or disposition of the Property by plaintiff.
>
> 2. Judging and declaring the acts of defendants to be in violation of the Constitution of the United States of America.
>
> 3. Ordering defendants to proceed forthwith to acquire the Property and to pay plaintiff the just and reasonable value thereof of $50,000 per cuerda or the total sum of $728,000 with interest theron at the rate of 6% per annum compounded annually from the date of the taking of same from plaintiff until payment of judgment.
>
> 4. Ordering defendants to pay plaintiff just compensation for the loss of income from the property in the sum of $980,000 with interest on such loss of income at the rate of 6% per annum compounded

annually from the respective date of damage until the payment of judgment.

5. Ordering defendants to pay plaintiff just compensation for carrying expenses and costs paid by plaintiff while plaintiff has held record title to the property from the date of wrongful taking of the property by said defendants until acquisition of formal and legal fee simple title by said defendants with interest thereon at the rate of 6% per annum compounded annually from the date of each such cost and expense until payment of judgment.

6. Granting to plaintiff its litigation expenses and disbursements including reasonable attorneys fees incurred in this action and by reason of said damages and said taking; and

7. For such other just compensation, damages and relief as to this court seems just and proper."

The complaint in *Citadel II* was answered by defendants on July 9, 1979.

Meanwhile, *Citadel I* was tried in the District Court on December 5, 1979, and final judgment was rendered on February 22, 1980, which was filed and entered on February 26, 1980. By said judgment, the Court permanently restrained defendants therein and their successors in office from enforcing or in any manner giving effect to any "freeze" or restriction on petitioner's property which had the effect of preventing its sale, lease, use or development, and enjoined respondents from reserving said property for construction of the planned interchange between Route 66 Expressway and the Barbosa Expressway. The Court directed defendants to revise the location of the planned interchange so as to eliminate petitioners property therefrom, and declared the acts of respondents to be in violation of petitioners constitutional rights: Respondents were ordered to pay litigation expenses and the sum of $35,000.00 for attorney's fees.

Although the District Court found that the actions of respondents therein had caused and would continue to cause petitioners severe and irreparable loss and damage and had destroyed its sole source of income and its lifeline, it did not award damages.

Neither party appealed the final judgment rendered in *Citadel I*. Accordingly, pursuant to the District Court's judgment of February 22, 1980, the Puerto Rico Planning Board adopted in its meeting of May 15, 1980 a resolution liberating the property from the restrictions which affected it.

On June 2, 1980, defendants in the case of *Citadel II* filed a motion to dismiss the complaint on the grounds that the action was barred by the doctrine of collateral estoppel an by the Eleventh Amendment to the Constitution of the United States. On July 21, 1980, plaintiff filed a motion in opposition to defendants' motion to dismiss and a cross-motion for partial summary judgment and for leave to file a First Amended Complaint so as to eliminate the Commonwealth of Puerto Rico as a named defendant, and "to conform its pleadings to the recent decisions" of *Owen* v. *City of Independence*, 445 U.S. 622 (1980) and *Pamel Corporation* v. *Puerto Rico Highway Authority*, 621 F.2d 33 (1st Cir. 1980) and to "the change of factual circumstances whereby plaintiff's property was unfrozen by defendants" in *Citadel I*. Defendants' motion to dismiss was granted by the District Court and the action was consequently dismissed. By its Memorandum Opinion and Order of March 23, 1982, the Court decided that the doctrine of collateral estoppel bars relitigation in *Citadel II* of plaintiff's claims that were adjudicated and laid to rest in *Citadel I*.

The Court of Appeals for the First Circuit affirmed the judgment of the district court dismissing the complaint,

on the grounds of the absence of a claim cognizable in a federal court.

REASONS FOR DENYING THE WRIT

I

The regulation of private property by the State in our modern life constitutes a basic and fundamental prerogative of police power.

Most of the regulations cannot, and as a matter of law, are not considered "takings" within the constitutional context of the action. Reasonable regulations that prevent an owner from using his land in such a way that it causes injury to others or deprives them of the reasonable use of their land have been held as not to require compensation by the state. *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1977).

Furthermore, there can be no test to determine when a regulation goes too far and becomes a taking. Each case must be determined under its own circumstances. The purpose of the regulation has been held as an element to be considered. *Burrows* v. *City of Keene*, 432 A. 2d 15 (1981) *Pruneyard Shopping Center* v. *Robbins*, 447 U.S. 74 (1980).

This Honorable Court has consistently decided on this matter in a restrictive way, against continuous allegations of "takings" from property owners. *Penn Central Transportation*, supra, at 133; *Miller* v. *Schoene*, 276 U.S. 272 (1928); *Haddacheck* v. *Sebastian*, 239 U.S. 394 (1915).

A property owner must establish that the right lost was so essential to the use of economic value of the property that a state-authorized limitation of it amounted to a taking. *Pruneyard Shopping Center*, supra. A decline in

market value, or the loss of the best or most profitable use of the property, does not conclusively demonstrate that a taking has occurred. *Goldblatt* v. *Hempstead*, 369 U.S. 590 (1962); *Andrus* v. *Allard*, 444 I.S. 51 (1979); *U.S.* v. *Central Eureka Mining Co.*, 357 U.S. 155 (1957). Rather than merely prevent the most beneficial use, governmental action must deny an individual "all" or "essential" use of his property before a confiscation occurs. *U.S.* v. *Causby*, 328 U.S. at 262 (1945); *Curtin* v. *Benson*, 222 U.S. 78 (1911).

It has been held that government action which interferes with the value of land only by making it less desirable for its present uses does not effect a taking, notwithstanding that prospective future business opportunities may have been destroyed. *Ortega Cabrera* v. *Municipality of Bayamon*, 562 F.2d. 91 (1st Cir. 1977).

Furthermore, loss of a potential profit is not a confiscation, *Hempstead General Hospital* v. *Whalen*, 622 F.2d. 573 (1979).

Even where there have been consequential damages resulting from exercise of lawful regulations, it has been held that the damages are not compensable takings within the scope of the Fifth Amendment. *Carruth* v. *U.S.*, 627 F2d. 1068 (1980).

The Constitutional test for compensation is also extremely restrictive towards the claiming party. In order to be entitled to compensation, the property owner must establish that his right to property loss was so essential to use or economic value of property, that the state-authorized limitation of it amounted to a decline in market value or loss of best or most profitable use of the property involved. *Pruneyard Shopping Center*, supra; see also *Goldblatt* v. *Hempstead*, supra; *Andrus* v. *Allard*, supra and *Barbian* v. *Panagis*, 694 F.2d 476 (7th Cir. 1982).

Landowners simply cannot premise a taking merely upon loss of the best use of their property. *Oceanic California Inc.*, v. *City of San Jose*, 497 F. Supp. 962. (U.S.D.C., N.D. California, 1980).

It is within the scope and context of these doctrines that the present controversy has to be reviewed. The Court of Appeals for the First Circuit held that the action be dismissed, but not on the ground of collateral estoppel (as the district court did) but on the ground of failure to state a claim cognizable in a federal court.

The decision was based on *Pamel Corp.* v. *Puerto Rico Highway Authority*, supra. Plaintiff in Pamel, like petitioner in the case at bar, sought damages equivalent to the value of property allegedly taken as a result of the restrictive zoning policies of the Puerto Rico Highway Authority.

In *Pamel*, supra, the Puerto Rico Highway Authority allegedly unconstitutionally deprived plaintiff of the entire value of two parcels of land by reclassifying them as "P," or for public use. Plaintiff sought damages under 42 U.S.C., sec. 1983 for the alleged uncompensated taking. The defendant answered the complaint by requesting a clarification of the same as to the location of the tracts, filing an answer and then a motion to dismiss for failure to state a claim upon which relief could be granted. The district court granted defendant's motion to dismiss because of lack of jurisdiction, reasoning that plaintiff's claim amounted to an action for inverse condemnation. The Court concluded that only the Commonwealth of Puerto Rico could condemn property pursuant to the power of eminent domain, that compensation for condemned property required expenditures from Commonwealth funds and that such a suit in the federal courts was barred by the Eleventh Amendment.

Plaintiff appealed the district court's dismissal, arguing that it had erred in concluding that the Commonwealth, rather than the Highway Authority, would pay the alleged damages as a matter of law.

Plaintiffs' theory was that the mere fact of classification of the property as "Public Use" deprived it of all value and constituted a "taking" of property rights by the Authority. Thus, plaintiff sought an award by the Federal Court of the value of the property.

The Court of Appeals (Coffin, Chief Judge) held that the complaint failed to state a claim upon which relief could be granted since there was no allegation that the Highway Authority had the authority to zone the property in question and that the only overt act alleged to have been committed by the Highway Authority was its decisions to widen a highway contiguous to the land in controversy.

The similarity between *Pamel*, supra, and the present case is evident.[1] Petitioner seeks damages for an action taken by the government that he claims has extinguished his property rights. The remedy sought is essentially the award by the federal court of the value of the property.

The regulations of property use may also be so oppresive or arbitrary so as to cross the bordering line separating a valid exercise of the police power from an exercise of the eminent domain power, which in turn would be invalid without payment of the just compensation mandated by the due process clauses of the Fifth and Fourteenth

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[1] "The governmental freeze on appellant's property is sufficiently similar to the restrictive zoning in Pamel to bring this case within our holding in Pamel." Cited from *Citadel Corp.* v. *Puerto Rico Highway Authority*, argued on October 4th and decided on December 22, 1982, Court of Appeals for the First Circuit, Per Curiam Opinion.

Amendment. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922); *Nectow* v. *City of Cambridge*, 277 U.S. 183 (1927). Even then, the remedy awarded has not been the value of the diminished property right, but a declaration of the invalidity of the purported exercise of the police power. *Agins* v. *City of Tiburon*, 598 P.2d. 25 (1979).

Furthermore, it has been held that a zoning regulation that exceeds the permissible bounds of the police power does not in reality confiscate the property, but "regulates with oppresive or arbitrary severity. Absent factors of government displacement of private ownership, occupation or management, there is no taking within the meaning of the constitutional limitations" *Fred F. French Inv. Co., Inc.* v. *City of New York*, 39 N.Y. 2d. 987 (1976). A Court does not declare that an offensive zoning regulation has taken the property, but that the government cannot impose the restriction without formally paying for it. (See Pamel Corp., supra.). In said case, the Hon. Court of Appeals concluded that the district court's conclusion that plaintiff could recover the lost value of his property as damages was erroneous. The court especifically upheld that a plaintiff cannot recover damages by means of the inverse condemnation remedy.

The case at bar, as we have stated, is no different from Pamel, nor from any at the other federal cases cited.

Petitioner alleged that its real property located at Sabana Llana Ward of Rio Piedras, P.R., with an area of eleven cuerdas and twenty-five hundredths of a cuerda (11.25), has been affected since 1965 by the planned development for public use of the interchange between Route 66 Expressway and the Barbosa Expressway at Sabana Llana South Ward, Rio Piedras, pursuant to a "Plan for Transportation and Use of Land for the Metropolitan

Area for 1985" approved by the Planning Board of Puerto Rico and by the governor of the Commonwealth. That the purpose of the "freeze" of petitioner's property was to enable defendants to reserve it for acquisition at as low a cost as possible as the site for the construction of said interchange and to prohibit any other use of the property in the meantime. Petitioner further alleged that as a result of the freeze of the property, respondents without just compensation deprived it of its property without due process of law in that since 1964, the property had been kept paralyzed and that respondents refused to unfreeze or to expropriate it, with the consequences of causing the value of the parcel of land to be destroyed, making it useless and worthless.

Historically, similar allegations have been dismissed by federal courts. As we have seen, this Honorable Court has consistently decided these cases in a restrictive way against plaintiffs. *Penn Central Transportation* v. *New York City*, supra. Further-more, a decline in market value, or the loss of the best or most profitable use of the property, does not conclusively demonstrate that a taking has occurred. *Andrus* v. *Allard*, supra. Loss of potential profit, as we have also seen, does not constitute a confiscation. *Hempstead General Hospital* v. *Whalen*, supra. And even if there have been consequential damages resulting from exercise of lawful regulations, case law has established that the damages are not compensable takings within the scope of the Fifth Amendment. *Carruth* v. *U.S.*, supra.

For all these reasons, the Honorable Court of Appeals for the First Circuit dismissed petitioner's appeal from the United States District Court decision. We respectfully sustain that the Court of Appeals did not err in dismissing said appeal.

II

The Honorable U. S. Court of Appeals for the First Circuit decided that this action be dismissed, but on other grounds rather than on the ground of collateral estoppel, when the District Court had held that Citadel I precluded appellant from relitigating the same issue in Citadel II. The First Circuit held that although the factual issues were identical, defendants different identities in the two actions made reliance on collateral estoppel inappropriate.

As case law has established, collateral estoppel has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation. *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979). It precludes parties from contesting matters that they had a full and fair opportunity to litigage, protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions. *Montana* v. *United States*, 440 U.S. 147, 153-154 (1979). Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980); *Montana* v. *United States*, supra, at 153.

The doctrine of collateral estoppel precludes relitigation of issues actually litigated and determined in a prior suit, regardless of whether the judgment was based on the same cause of action as the second suit. *P I Enterprises, Inc.* v. *Cataldo*, 457 F.2d 1012 (1st. Cir., 1972). The application of collateral estoppel in federal courts is

no longer grounded upon the mechanical requirements of mutuality. Rather, the significant question is whether a party has had a "full and fair" opportunity for judicial resolution of the same issue. *P I Enterprises, Inc.* v. *Cataldo*, supra; *Cardillo* v. *Zyla*, 486 F.2d 473 (1st Cir., 1973); *Bricker* v. *Crane*, 468 F.2d 1228 (1st. Cir. 1972). The Court of Appeals viewed the cases as identical in issues, but stated that "defendants different identities in the two actions make reliance on collateral estoppel inappropriate."

In Citadel I, the defendants were Rafael Hernandez-Colon, individually and as Governor of the Commonwealth of Puerto Rico; Rafael Alonso-Alonso, Francis Conway and Luis Negron Zayas, individually and as members of the Planning Board of the Commonwealth; Rafael Ignacio, individually and as Secretary of the Department of Transportation and Public Works of the Commonwealth; Jose G. Jaramillo, individually and as Director of the Office of Land Acquisition of the Department of Transportation and Public Works; and Carlos Rios, individually and as Secretary of Justice of the Commonwealth.

It is evident that petitioner joined as defendants in its original complaint all the persons which had something to do with the restriction imposed on its property, among them the members of the Planning Board of Puerto Rico, the Secretary of the Department of Transportation and Public Works and the Governor of Puerto Rico. The fact that the District Court did not permit petitioner to join as defendants the Highway Authority and the Land Authority did not deprive them of full and fair opportunity in Citadel I to press its claim against the persons which imposed the restriction on its property. As a matter of fact, petitioner prevailed in its challenge to the restriction

and, consequently, injunctive relief was granted in its favor ordering the "unfreezing" of the property as requested. Petitioner chose not to appeal the final judgment as to the denial of new defendants nor as to the failure of the Court to award damages, nor did it seek reconsideration, nor a permissive interlocutory appeal under 28 U.S.C., Sec. 1292 (6), as to the order denying the joinder of new defendants.

It was petitioner's prerrogative to litigate the issue of governmental entities liability for an alleged unconstitutional action. If this option was not exercised, it was something that respondents could not control, and therefore, a factor that cannot be taken against them.

The Court of Appeals also based its refusal to apply the collateral estoppel claim on 'defendants' different identities in the two actions."[2] In *Citadel II*, defendants were the Puerto Rico Highway Authority and the Puerto Rico Land Authority.

As we have stated, on February 13, 1979 petitioner filed a motion to join the Puerto Rico Highway Authority, the Puerto Rico Land Authority and the Commonwealth as defendants. Said Motion was denied, on the basis that it was illtimed and improper, inasmuch as it was filed more than two years after the original complaint and more than seven months after the establishment of a time table by the Court.

Case law has established that identity of parties is not a mere matter of form, but of substance. Parties nominally

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[2] The Court of Appeals also cites the Supreme Court decision in *San Diego Gas & Electric Co.* v. *City of San Diego*, 430 U.S. 621 (1981). The case at bar was originated in a federal court, and the lower court in San Diego Gas was a state court. The damages issue clearly does not apply in the present action.

the same may be, in legal effect, different, and parties nominally different may be, in legal effect, the same. *Chicago, R.I. & P. R. Co.* v. *Schendel*, 270 U.S. 611 (1925). It has been held that "there is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is res judicata in relitigation of the same issue between that party and another officer of the government." *Tait* v. *Western Maryland R. Co.*, 289 U.S. 620 (1932).

In the case at bar, petitioner brought as defendants the Highway Authority and the Puerto Rico Land Authority.

The powers and duties of the Highway Authority are discharged by the Secretary of Transportation and Public Works according to the reorganization plan number 6 of 1971. (3 L.P.R.A., App. III, page 502). The Secretary of Transportation and Public Works was joined as a defendant in *Citadel I*.

Furthermore, the Land Authority of Puerto Rico was created for the purposes of carrying out the agricultural policy of the Commonwealth of Puerto Rico. As such, it has nothing to do with the planning and construction of highways nor with the imposition of zoning restrictions on the land in the Commonwealth of Puerto Rico (28 L.P.R.A., Secs. 247 *et seq.*). Therefore, we respectfully sustain that the Court of Appeals erred in finding different identities in the two actions on the part of defendants, which in turn made reliance on collateral estoppel inappropriate. Having the same identity, we need not discuss any further the Court of Appeals determination that "appellees have not demonstrated that the issue of defendants liability in Citadel II is the same as that in *Citadel I*." Being the same defendants, the liability issue in the first case is the same one as in *Citadel II*.

CONCLUSION

For all the reasons stated above, we respectfully sustain that petitioner's Writ of Certiorari should be denied.

Respectfully submitted.

San Juan, Puerto Rico, this 22nd day of July, 1983.

MIGUEL PAGAN
Acting Solicitor General

GERARDO MARIANI
Assistant Solicitor General

CERTIFICATE OF SERVICE

I hereby certify that on this same date three printed copies of the foregoing Opposition to the Petition for a Writ of Certiorari have been served by certified mail to Robert H. Rout, Esq., Counsel for Petitioner, at his address in Lakeville, Conn. 06039.

San Juan, Puerto Rico, this 22nd day of July, 1983.

GERARDO MARIANI
Assistant Solicitor General
Department of Justice
P. O. Box 192
San Juan, Puerto Rico 00902
Phone: (809) 721-2900 Ext. 307